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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

TAYLOR ROY SHEPHERD,

Defendant and Appellant.

A104614

(Lake County  
Super. Ct. No. CR5528)

On retrial following a mistrial, a jury convicted defendant Taylor Roy Shepherd of mayhem and other offenses. The trial court suspended imposition of sentence and placed defendant on five years' probation. The charges arose from an altercation in which defendant allegedly threw a cabinet door at a 15-year-old boy, fracturing his skull. Defendant contends that the trial court erred in refusing to allow him to read the testimony of a defense witness given at his first trial when he was unable to procure that witness's attendance at the retrial. Defendant further contends that a condition of his probation prohibiting him from gambling is invalid. We agree with the latter contention and remand the case with directions to strike the no-gambling condition. In all other respects, we affirm the judgment.

**I. BACKGROUND**

Defendant was charged by information with mayhem (Pen. Code, § 203; count I), assault with a deadly weapon and by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1); count II), and felony child endangerment (Pen. Code, § 273a, subd. (a); count III). Counts II and III included allegations that defendant

personally inflicted great bodily injury. (Pen. Code, § 12022.7, subd. (a).) Defendant pleaded not guilty to all counts and denied the special allegations.

Defendant's first trial ended in a mistrial when the jury was unable to reach a verdict. A second jury trial commenced on August 5, 2003.

### **Prosecution Case**

On August 28, 2002, Kate Lane was living in Nice, California with her children Elliott, then 15 years old, and Jessica, who was then 17 years old and had just graduated from high school. Nick Perez, a family friend who was 14 years old, lived with the Lanes. William Santos, 22 years old, lived in a trailer up the hill from the Lane residence. A 16-year-old friend of Elliott's, Darnay Roston, had come over to visit the Lanes' house on that date.

On the evening of August 28, Jessica left the home and went up the hill to Santos's trailer where a number of other people had gathered to drink alcohol and socialize. Kate, who had returned from work at 6:00 p.m., had told Jessica not to leave the house that evening. After realizing at approximately 8:00 p.m. that Jessica was gone, Kate became angry and went to look for her at Santos's residence, without success. Kate was very upset both that Jessica had disobeyed her and that she was apparently drinking. Nick and Elliott observed Kate sitting at the kitchen table crying.

At 9:00 or 9:15 p.m., Darnay, Elliott, and Nick walked up the hill to Santos's trailer to find Jessica and bring her home. They found Jessica in the kitchen. Antoinette Alfaro, another partygoer, was holding onto Jessica. Antoinette's arms were wrapped around Jessica, and she would not let go. Antoinette was drunk, loud, and upset. Jessica was also drunk and upset. Elliott told his sister that their mother was crying, that she was angry at Jessica, and that Jessica had to go home.

According to Elliott's testimony, Jessica was trying to get away from Antoinette. Elliott asked Jessica several times to come home. Elliott spoke calmly. He was not loud. Elliott tried grabbing his sister's hands, and he also tried to pull on Antoinette's arms to get them apart.

Darnay testified that defendant walked up and separated the two girls.<sup>1</sup> Afterward, he took Elliott aside and told him that his sister had a drinking problem. Defendant appeared to be intoxicated. He was staggering, and his speech was slurred. Based on his tone of voice, defendant seemed upset. Elliott told defendant, in a normal tone of voice, that he knew Jessica had a drinking problem, but he just wanted to get her home, and then he would handle the problem. Elliott also calmly told defendant to “stay out of it.”

Defendant responded by punching Elliott in the right eye with his fist. The punch blurred Elliott’s vision a little. Other than telling defendant to “stay out of it,” Elliott had done nothing that would have provoked defendant’s attack on him. After defendant hit him, Elliott did not retaliate because he knew defendant was drunk. Instead, Elliott once again tried to get Antoinette off his sister and to get his sister to come home.

After hitting Elliott, defendant seemed angry and started punching a cabinet that was near the back door of the house. One of the cabinet doors broke off its hinges. After Jessica was separated from Antoinette, Elliott, Jessica, Nick, and Darnay started to leave the trailer through the back door, next to the broken cabinet. They were going to go down the hill to the Lane residence. They exited the trailer, and Elliott and Nick went down the stairs. Darnay and Jessica followed them.

Defendant came up to Elliott and asked if everything was “cool.” Elliott responded to defendant’s question with words to the effect, “Yes, if you don’t flip out again.” The two of them may have shaken hands. Thereafter, defendant punched Elliott in the face again. Elliott could see that the person who hit him this time was the same person who had hit him before, inside the trailer. There were lights outside, and defendant was only about a foot or two from Elliott when he hit him. Elliott had not done anything to provoke this attack. Again, Elliott did not fight back. In any event, another

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<sup>1</sup> Elliott had seen defendant several times before August 28, 2002. However, he had never met defendant before that night and did not previously know his name. Nick had not met defendant before that night. Darnay said he had known defendant for more than two years before August 28, 2002. They had socialized together a couple of times and, according to Darnay, were “pretty decent friends.”

partygoer grabbed defendant and walked him away. Defendant may have gone inside the trailer at that point.

Elliott again started to leave the area, walking down the open field toward home, with Darnay, Nick, and Jessica following him. Before they left the area of Santos's trailer, however, defendant came outside holding the door of the broken cabinet. He proceeded down toward the foursome that was already walking down the hill. Jessica asked defendant if he was going to hit her with the door. He looked angry. Defendant yelled, "Hey," very loudly. Until that point, Elliott had had his back to defendant. When defendant yelled, "Hey," everyone looked. Elliott turned around. When defendant was a few steps from Elliott, defendant threw the cabinet door like he was passing a basketball. The corner of the door hit Elliott in the forehead. Elliott dropped to the ground.

Jessica testified that when defendant threw the door at Elliott, she, defendant, Elliott, Nick, and Darnay were present. She said that Santos was also around somewhere, but she did not see him outside when defendant hit Elliott with the door. According to Darnay's testimony, he had seen Santos at the house that night, but Darnay did not see Santos anywhere nearby when Elliott got hit in the head with the door. Nick initially testified that Santos was not in the area when defendant threw the door at Elliott, but later he said that Santos was at the bottom of the stairs of his porch, about 30 feet away from defendant.

After throwing the door at Elliott, defendant ran down to where Elliott was lying on the ground. Elliott was not moving. Defendant bent down and punched Elliott in the face. After punching Elliott, defendant got up and started running back up the hill toward the house. He did not enter the residence, but instead went up onto the street above Santos's trailer and disappeared. Elliott's head was split wide open, and blood was everywhere. Nick and Darnay helped Elliott up and started walking him home.

One of the police officers who arrived at Santos's house very shortly after the assault was Lake County Sheriff's Deputy Mark Hommer. At trial, Deputy Hommer testified that he knew defendant, but did not see him at Santos's house. Deputy Hommer

also testified that he spoke with Santos that evening. Santos appeared intoxicated and told Deputy Hommer that he had not seen what happened.

When Darnay and Nick got Elliott home, Kate immediately decided that he needed to go to the hospital. Darnay and Nick accompanied her and Elliott to Sutter Lakeside Hospital, about five minutes away. The emergency room physician at Sutter Lakeside Hospital determined that Elliott needed to see a neurosurgeon. Elliott was taken by helicopter to Children's Hospital in Oakland, where he underwent surgery that night to repair a fracture to his skull.

Deputy Mark Hommer returned to Santos's residence shortly after midnight on August 29, 2002. There, he located the approximately two-foot-by-four-foot cabinet door which Darnay and Nick had described to him as the weapon used by defendant to assault Elliott. The door was lying on the ground in the back yard of Santos's trailer, about 50 to 75 feet from the back porch. The door was processed for fingerprints, but no usable prints were found.

Over the next couple of weeks, Deputy David Perry attempted to contact defendant. He went to defendant's workplace and also talked to defendant's mother several times and asked her to have defendant contact him. However, Deputy Perry never located defendant. To his knowledge, defendant never attempted to contact him.<sup>2</sup>

The neurosurgeon at Children's Hospital in Oakland who performed the surgery on Elliott, Dr. Michael Sheinberg, testified that Elliott's injuries were consistent with someone having thrown the cabinet door at him, hitting him in the forehead. After the surgery, Elliott had several follow-up visits to the neurosurgeon, to insure that there was no infection of the brain, and to have a plate inserted into his head. At the time of the second trial, in August of 2003, Elliott had a permanent scar on his forehead. Following the injury, Elliott could not participate in sports and various physical activities. At the time of trial, Elliott had no memory of how his head had been injured.

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<sup>2</sup> Defendant testified that he learned from his mother that Deputy Perry was trying to contact him, and that he called Perry's number and left a message for him.

Nick testified that he talked to Jessica and Darnay about this case before testifying at trial. However, Nick testified that he was positive of his identification of defendant as the person who had thrown the cabinet door at Elliott, and he said that his identification testimony and his testimony about what he observed were based on his own independent recollection. Nick said that he did not consume any alcohol that day.

### **Defense Case**

Defendant testified on his own behalf. He testified that on August 28, 2002, he was 18 years old. He and his cousin, Johnny Lozano, arrived at Santos's trailer just as darkness began to fall. They went there to have a few beers. Santos had invited defendant, telling him that he was only inviting a couple of other people to come over.

About 45 minutes after defendant's arrival, Jessica Lane showed up with Darnay. Knowing that Santos had only invited a few people, defendant said to them, "I didn't know you guys were supposed to be here," and asked them what they were doing there. They said they came to see Santos.

Defendant testified that he drank about one and a half beers before Jessica arrived and then one beer afterwards. Later, he smoked some marijuana with Jessica and Antoinette in the bathroom.

Defendant noticed Elliott in the living room when he, Jessica, and Antoinette left the bathroom. Elliott grabbed his sister in an attempt to get her to leave. Jessica resisted her brother. Defendant told Elliott to get his sister out of the trailer because she was drunk. Elliott said, "I'm trying." Elliott was angry and cussing at Jessica and Antoinette. At one point, defendant told Elliott to shut up and then Elliott pushed him. Defendant pushed Elliott back. At the urging of another guest, defendant left the trailer and stepped out onto the porch.

While defendant was on the porch smoking a cigarette, Elliott came out of the trailer with Antoinette, Jessica, Darnay, and possibly Nick. Elliott gave defendant an angry look. This prompted defendant to say to Elliott, "Hey, is [*sic*] there any problems here or are we cool?" Elliott said, "Yeah, no problem," and they shook hands.

Santos was talking to Jessica during this time, telling her and her companions that she was not supposed to be there and that he had called the police. After saying this, Santos told defendant, “Well they ain’t listening to me.” Defendant then told the group, “Now you guys got to go, because this is his house, you know.” At that point, Elliott came up to defendant, said, “I thought we were cool, man,” and then pushed him. They started pushing each other and Elliott took a swing at defendant. At the same time, Santos tackled Darnay after Darnay tried to hit defendant with a stick. Defendant ran away from the scene when he saw Jessica come after him with a bottle.

Defendant denied throwing the cabinet door at Elliott and testified that he did not see Elliott suffer the head injury that sent him to the hospital.

### **Verdict and Sentencing**

On August 14, 2003, the jury returned guilty verdicts as to all three counts, and found true the great bodily injury allegations. At defendant’s initial sentencing hearing, the trial court announced its decision to grant probation, but deferred the pronouncement of probation terms and conditions to a later date. The probation department filed a supplemental probation report recommending various terms and conditions of probation including that defendant be required to abstain from gambling, that he not be in or about any place where the primary activity is gambling, and that he not possess gambling-related items, until such time as all restitution and restitution fines and fees have been paid.

At the continued sentencing hearing, defendant objected to the proposed gambling-related condition of probation. The trial court suspended imposition of sentence and placed defendant on probation for five years conditioned on terms that included 360 days in county jail, a restitution fine of \$2,500, a fine of \$10 plus penalty assessments of \$17, and abstention from gambling, as recommended by the probation department, until such time as all restitution and restitution fines and fees were paid. This timely appeal followed.

## II. DISCUSSION

### *Exclusion of Santos's Former Testimony*

Defendant contends that the trial court erred in refusing to declare William Santos to be unavailable as a witness in the second trial, and to permit his testimony at the first trial to be considered by the jury.

#### **Facts**

After the prosecution rested its case-in-chief, defendant's trial counsel advised the court that she was having a "scheduling difficulty" with William Santos whom she intended to call as a witness, and that she had "family members out looking for him." The defense proceeded with the testimony of defendant. Later that day, defense counsel reported that David Ell, presumably a defense investigator or process server, had left a subpoena for Santos "at his location," after attempting to serve him with a subpoena on several different occasions. Counsel told the court that Santos had been in contact with defendant's family that week and had expressed reluctance to testify. Santos told them that he would testify if he was still in town. Defense counsel stated that she was assured by her client that Santos would appear that evening at his team's baseball game. She requested a continuance until the next morning to allow time for Santos to be served with a subpoena at the game. The trial court agreed to the continuance for that purpose, and excused the jurors until the next morning.

The next day, defense counsel informed the court that the defense was unable to secure Santos's attendance at the trial. He had not appeared at the baseball game the night before, and had not been served with process. Santos's mother had informed defendant's family that Santos had in fact left the state. Defendant requested that Santos's sworn testimony at the first trial be admitted on the basis that Santos was unavailable as a witness for purposes of Evidence Code sections 1291 and 240.<sup>3</sup>

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<sup>3</sup> Evidence Code section 1291 provides in relevant part as follows: "(a) Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and: [¶] . . . [¶] (2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and



Defendant's mother, Veronica Tovar, testified as to her attempts to procure Santos's attendance. During the previous two weeks she had contacted Santos in person at his workplace and told him the family would need him to testify again. She spoke to him again a few days before her testimony, explaining that he was needed to testify. In addition, family members had made several visits to his house, and to his mother's, father's, and brother's houses, to contact him. They did not find him at any of those locations. The family had also tried to locate him at the previous night's baseball game and in a nearby area where they were told he had been dropped off before the game. They had called his home telephone number, learning that it had been disconnected. Messages left when calling his cell phone number had gone unreturned.

On cross-examination, Tovar admitted that she had first tried to serve a subpoena on Santos the day before she testified. She had not checked to see if he was in any hospital or in jail.

Defense counsel advised the court that Mr. Ell was not available that day to testify as to his actions.

### **Analysis**

The proponent of former testimony evidence has the burden of proving by competent evidence that the witness is unavailable. (*People v. Smith* (2003) 30 Cal.4th 581, 609.) When the facts are undisputed, we review the trial court's finding on the unavailability issue de novo. (*People v. Smith*, at p. 610; *People v. Cromer* (2001) 24 Cal.4th 889, 900–901.) In this case, we affirm the trial court's determination that defendant failed to prove he exercised reasonable diligence in procuring Santos's attendance at trial.

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had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing." Evidence Code section 240 states that a person may be deemed to be " 'unavailable as a witness' " in a court proceeding if the person is "[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process." (Evid. Code, § 240, subd. (a)(5).)

The first trial ended in a mistrial on May 22, 2003. On May 27, 2003, the case was set for retrial on August 5, 2003, and jury selection in fact began on that date. Despite having more than two months to secure Santos's attendance at the retrial, there is no competent evidence in the record that the defense made any attempt to personally serve Santos with a subpoena until *the night before* the due diligence hearing. That sole proven attempt to serve Santos had not even been made until the defense had requested a one-day continuance of the trial for that purpose. Although defense counsel represented to the court that Mr. Ell had made earlier attempts to serve Santos, such representations cannot substitute for competent evidence of such efforts. Even accepting counsel's comments at face value, there was no evidence that her investigator's efforts to serve Santos were timely, diligent, or reasonable. Counsel merely stated that investigators had gone to Santos's residence three or four times on unspecified dates. She provided no facts as to when those visits began, what times of day they took place, or what other steps the investigators took to locate Santos. There was no evidence that the defense had surveilled Santos's workplace or residence, or the residences of his close relatives. There was also no evidence that Santos had agreed to appear in court voluntarily on a particular day.

On this record, the trial court correctly held that defendant failed to show reasonable diligence and therefore failed to establish that Santos was unavailable as a witness. His former testimony was properly excluded under Evidence Code section 1291.

### **Ineffective Assistance**

Defendant argues in the alternative that his trial counsel provided ineffective assistance by failing to act diligently to insure Santos's presence at trial.

To demonstrate ineffective assistance of counsel, defendant must show that: (1) counsel's failure to insure Santos's presence at trial was deficient under prevailing professional norms; and (2) but for counsel's failings, it is reasonably probable that the result of the proceeding would have been more favorable to him. (See *People v. Seaton* (2001) 26 Cal.4th 598, 666.)

The record in this case fails to support defendant's claim that his counsel's performance fell below professional norms. Santos testified at the first trial. Counsel may have had reason to believe that he would voluntarily appear at the second trial and that serving Santos with a subpoena might alienate him. There is no way to determine from the record whether counsel held these views and, if so, whether they were well-founded or not. It is also impossible to tell at what point counsel should have recognized the need to serve Santos with compulsory process. In addition, the record does not disclose what steps counsel instructed Ell and defendant's family to take in order to effectuate service on Santos, when those instructions were given, and whether they were followed. In fact, there was no competent testimony as to the steps Ell actually did take to serve Santos.

We also cannot rule out the possibility that trial counsel reasonably considered Santos's testimony to be of very limited value to the defense. At the first trial, Santos testified that he did not see Elliott get injured and had no knowledge of how it occurred. He also had no knowledge of how his cabinet door had become detached. Moreover, Santos's version of the events preceding the injury was not even consistent with defendant's testimony. The gist of Santos's former testimony was simply that Elliott pushed defendant a couple of times inside the house and acted in a somewhat louder and more aggressive fashion that evening than the prosecution witnesses suggested. He admitted that he did not see Elliott do anything outside the house that would have provoked someone into assaulting him with a cabinet door. He shed no light whatsoever on who else, besides defendant, might have caused Elliott's injury. Santos also had an obvious bias as a defense witness in that defendant was his lifelong friend. Given the weakness of Santos's prior testimony, defense counsel's failure to exert every possible effort to procure his attendance at the retrial may well have been a reasonable tactical choice.

Defendant fails to establish that trial counsel was ineffective in failing to procure Santos's presence at trial.

### ***No-Gambling Condition of Probation***

Defendant contends, and we agree, that the trial court erred in requiring defendant to abstain from gambling during his probationary term unless his restitutionary obligations were satisfied.

Penal code section 1203.1 provides in relevant part as follows: “The court may impose . . . reasonable conditions [in granting probation], as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer . . . .” (Pen. Code, § 1203.1, subd. (j).)

Although trial courts have broad discretion to formulate probation conditions under section 1203.1, that discretion is not unlimited. (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120–1121.) A condition of probation may be deemed invalid if it “ ‘(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality . . . .’ ” (*People v. Lent* (1975) 15 Cal.3d 481, 486, quoting *People v. Dominguez* (1967) 256 Cal.App.2d 623, 627.)

The People concede in this case that (1) gambling bears no relationship to the crime of which defendant was convicted, and (2) gambling is not in itself criminal. The People’s sole contention is that the court’s order regarding gambling tends to maximize the likelihood that defendant will have the ability to pay off his restitutionary obligations. This rationale goes too far. On the People’s theory, a trial court could prohibit a probationer from purchasing any legal product or service that it deemed superfluous or undesirable until the probationer’s restitution debts were paid. There is nothing in this record to indicate that defendant gambles or has a problem with gambling, nor is there any evidence that he is unwilling or unable to fulfill his restitution obligations. In our view, the no-gambling condition is invalid as a matter of law in these circumstances, and must be stricken.

### III. DISPOSITION

We remand the matter with instructions that the order and judgment granting probation be amended to strike the condition prohibiting defendant from gambling, being present in or near gambling places, or possessing gambling-related items. In all other respects, the judgment is affirmed.

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Margulies, J.

We concur:

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Stein, Acting P.J.

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Swagger, J.